No. 14-116

In the Supreme Court of the United States

LOUIS B. BULLARD, PETITIONER

v.

BLUE HILLS BANK, FKA HYDE PARK SAVINGS BANK, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether an order denying confirmation of a bankruptcy plan is appealable.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Carolyn A. Bankowski, Chapter 13 Trustee, was a party to the proceedings in the court of appeals.

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No. 14-116

LOUIS B. BULLARD, PETITIONER

v.

BLUE HILLS BANK, FKA HYDE PARK SAVINGS BANK, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 752 F.3d 483. The opinion of the bankruptcy appellate panel (Pet. App. 18a-36a) is reported at 494 B.R. 92. The orders of the bankruptcy appellate panel denying certification to the First Circuit (Pet. App. 16a-17a) and granting petitioner's motion for leave to appeal to the panel (Pet. App. 37a-45a) are not reported. The opinion of the bankruptcy court (Pet. App. 46a-67a) is reported at 475 B.R. 304.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2014. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent portions of Sections 157, 158, 1291, and 1292 of Title 28 of the United States Code are reprinted in the appendix to this brief. App., *infra*, 1a-9a.

STATEMENT

This Court has long recognized that the right to appeal in bankruptcy is broader than in ordinary civil litigation and frequently permits parties to appeal before the entire bankruptcy case is terminated. Those broader appeal rights are embodied in the terms of the statute authorizing bankruptcy appeals, 28 U.S.C. § 158. In this case, both the bankruptcy court and the bankruptcy appellate panel (BAP) denied confirmation of petitioner's Chapter 13 plan. Recognizing that such a denial is appealable provides a direct and sensible route for review of crucial and dispositive rulings. It also provides the courts of appeals with the opportunity to harmonize and develop the law.

1. Congress designed Chapter 13 bankruptcy proceedings to enable an individual debtor with a regular income to repay creditors in installments. 7 Norton Bankr. L. & Prac. 3d § 139:13. To do so, the debtor proposes a plan to repay all or part of the money owed to his creditors over not more than three or five years, depending on the debtor's income. *Id.* The plan lists

all priority and secured claims against the estate, allots a portion of the debtor's income to payment of unsecured claims on a pro rata basis, and proposes a payment schedule to satisfy those claims. 11 U.S.C. § 1322. Once the debtor makes all payments required by the plan, the unsecured debts are discharged, subject to limited exceptions. 11 U.S.C. § 1328(a).

2. Petitioner, Louis B. Bullard, owns and resides in a two-family property at 318 Union Street in Randolph, Massachusetts (the "Property"). Pet. App. 47a. Respondent, Blue Hills Bank (formerly Hyde Park Savings Bank), holds a mortgage on the Property. *Id.* The mortgage secures a promissory note with a maturity date of June 1, 2035, in the original principal amount of $387,000. *Id.* at 1a.

On December 14, 2010, petitioner filed a voluntary petition for Chapter 13 bankruptcy in the United States Bankruptcy Court for the District of Massachusetts. Pet. App. 47a. Respondent filed a proof of claim in the amount of $346,006.54. *Id.* Though petitioner valued the Property at $245,000 and respondent valued it at $285,000, they both agreed that it was worth substantially less than respondent's claim. *Id.*

3. Petitioner filed his Chapter 13 plan on December 22, 2010. Pet. C.A. App. 48. He amended the plan three times to reflect more accurately the value of the Property, the claim amount, and the terms of the mortgage; the total amount owed to unsecured creditors; the treatment of the mortgage; and the consequent changes in the expected payments to unsecured creditors. *See* Mots. To Amend Chapter 13 Plan (filed Mar. 14, 2011, Oct. 6, 2011, and Jan. 17, 2012). Petitioner filed the Third Amended Plan on January 17,

2012. *See* Pet. C.A. App. 1-8.[1] Aside from the mortgage, the plan lists less than $3,000 in claims. *Id.* at 2.

Because the other claims were so low, the primary impact of the plan was on the mortgage. The plan proposed a "hybrid" treatment, which divided respondent's mortgage claim into a secured claim backed by the Property and an unsecured claim. Pet. App. 19a & n.3. The secured claim would be valued at the then-current value of the Property, under 11 U.S.C. § 506(a). Petitioner would continue making payments in the original amount until the secured claim was fully paid. Pet. App. 20a-21a. The underwater portion of the mortgage would be treated as unsecured, and, like other unsecured debts, repaid 5.26% of its value (the "dividend"), with the balance discharged after five years. *Id.* at 48a. Respondent objected to confirmation of the plan. *Id.* at 46a.

On July 24, 2012, the bankruptcy court denied confirmation, because it viewed a hybrid plan as an impermissible combination of 11 U.S.C. §§ 1322(b)(2) and 1322(b)(5) of the Bankruptcy Code. Pet. App. 66a-67a.[2] The court observed that "[s]everal bankruptcy courts in [the First C]ircuit have answered the

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[1] The bankruptcy court mistakenly stated that the plan was filed on January 7, 2012. Pet. App. 48a.

[2] Petitioner's plan is based on the proposition that, pursuant to the cited provisions of Chapter 13, he may split respondent's partially secured claim into secured and unsecured components and reduce the mortgage principal secured by the lien to the fair market value of the property. *Dewsnup* v. *Timm*, 502 U.S. 410 (1992), which did not involve those Chapter 13 provisions, held that a similar bifurcation of a partially secured claim is not available to a Chapter 7 debtor. Another Chapter 7 case, *Bank of*

question [*i.e.*, whether a hybrid plan is valid] in the affirmative . . . while other courts, including the . . . Ninth Circuit, have answered with a resounding 'no.'" *Id.* at 56a (footnotes omitted).

4. Bankruptcy court orders are appealable at two levels. Under 28 U.S.C. § 158(a), "district courts . . . shall have jurisdiction to hear appeals . . . from final judgments, orders, and decrees . . . entered in cases and proceedings referred to the bankruptcy judges [.]" In those circuits that have established a bankruptcy appellate panel (BAP), the BAP has the same jurisdiction; it may "hear and determine, with the consent of all parties, appeals under subsection [158](a)." 28 U.S.C. § 158(b)(1).

A second-level appeal is authorized by two independent statutes: 28 U.S.C. § 1291, which generally applies to appeals from district courts, and 28 U.S.C. § 158(d)(1), which applies only to bankruptcy appeals. *See Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992). Section 158(d)(1) provides that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section." 28 U.S.C. § 158(d)(1).

America, N.A. v. *Caulkett*, No. 13-1421, *petition for cert. granted*, Nov. 17, 2014, presents the question whether a Chapter 7 debtor may void a lien attached to a claim that is completely unsecured under 11 U.S.C. § 506(a).

5. Petitioner appealed to the bankruptcy appellate panel (BAP), which affirmed. Pet. App. 18a-36a.

a. The BAP concluded that the bankruptcy court's order denying confirmation of the plan was not final and appealable as of right under 28 U.S.C. § 158(a)(1), because it left petitioner "free to propose an alternate plan." Pet. App. 42a. The court, however, granted petitioner's motion for leave to appeal under 28 U.S.C. § 158(a)(3), which authorizes appeals "with leave of the court, from other interlocutory orders and decrees." Pet. App. 22a, 45a. The court held that the bankruptcy court's order denying confirmation "controls the outcome of the case because the appeal will decide whether [petitioner] can confirm a plan or dismiss his case." *Id.* at 43a. The court also determined that there was "[s]ubstantial ground for difference of opinion" on the validity of hybrid plans, *id.*, and that the appeal thus presents a "difficult and pivotal question of law." *Id.* at 44a.

Finally, the BAP determined that the appeal would "[m]aterially advance the ultimate termination of the litigation," because "it appears that the Debtor is correct in suggesting that he could not realize confirmation of a subsequent amended plan." Pet. App. 44a. Accordingly, his only option would be "to await dismissal of the case and determine whether to pursue the appeal." *Id.* Because he might not be able to obtain a stay of creditors' enforcement actions, "this option could potentially result in the loss of the property," which "would not only irreparably harm the Debtor but would significantly alter his incentive to pursue an appeal." *Id.*

b. On the merits, the BAP acknowledged that "Massachusetts bankruptcy courts are split on the issue of hybrid plans," and that "[d]ecisions elsewhere are in disarray." Pet. App. 23a. Ultimately, the BAP affirmed the bankruptcy court's decision, *id.* at 18a-36a, although its "rationale differ[ed] somewhat" from that of the bankruptcy court. *Id.* at 20a.

c. Petitioner noticed an appeal to the First Circuit. Insofar as the appeal might be viewed as interlocutory, he also requested certification of an interlocutory appeal from the BAP under 28 U.S.C. § 158(d)(2). Under that provision, the parties jointly, or the district court, bankruptcy appellate panel, or bankruptcy court, may certify that an interlocutory order "involves a question of law as to which there is no controlling decision" from a higher court, that it "involves a matter of public importance," that it "involves a question of law requiring resolution of conflicting decisions," or that "immediate appeal . . . may materially advance the progress of the case or proceeding in which the appeal is taken." 28 U.S.C. § 158(d)(2)(A). The court of appeals may then authorize the appeal. Section 158(d)(2) is broader than 28 U.S.C. § 1292(b), which governs certified interlocutory appeals in ordinary civil actions, because the standards of Section 158(d)(2) apply disjunctively, rather than conjunctively, and because the parties may jointly make the initial certification.

The BAP declined to certify the appeal to the First Circuit. Pet. App. 17a. The BAP did not question its earlier rulings that the criteria warranting interlocutory appeal were present in this case. *Id.* at 22a n.5.

Instead, it merely stated that "[a]s the Panel has rendered its Judgment on the year-old appeal and [petitioner] has already filed his notice of appeal to the First Circuit, the requested certification is unnecessary." *Id.* at 17a.

6. The First Circuit dismissed petitioner's appeal for lack of jurisdiction. Pet. App. 1a-15a. The court agreed with the other courts below that "[this] appeal presents an important and unsettled question of bankruptcy law." *Id.* at 1a; *see also* Pet. App. 4a n.1 ("a difficult, unsettled question"). Nonetheless, the court held that it lacked jurisdiction. Pet. App. 15a. In the court's view, "when an intermediate appellate court remands a matter to the bankruptcy court for significant further proceedings, there is no final order[.]" *Id.* at 5a. (internal quotation marks omitted).

The court recognized that in this case, the hybrid plan was the "only feasible plan" and that its holding left petitioner with the "unappealing" options of either proposing and obtaining confirmation of an unwanted plan and then appealing that ruling, or "allow[ing] his petition to be dismissed and appeal[ing] the dismissal." Pet. App. 8a-9a. The court held that nonetheless petitioner does "remain[] free to propose an amended plan" without the hybrid features. *Id.* at 7a. If he does so, creditors could object, leading to further proceedings to resolve the objections. *Id.* at 8a. Because those proceedings would not be "mechanical or ministerial," the court held that the BAP's denial of plan confirmation was not final. *Id.* (internal quotation marks omitted).

SUMMARY OF ARGUMENT

I. The BAP's denial of plan confirmation was final and appealable as of right. This Court, other federal courts, and commentators have historically recognized that appeals are permitted more broadly in bankruptcy cases than in the ordinary civil context. Congress drafted 28 U.S.C. § 158(d)(1), which authorizes bankruptcy appeals, to provide for such additional flexibility, in two distinct ways.

First, while 28 U.S.C. § 1291, which applies to all civil cases, permits appeals only from decisions that dispose of the merits of an entire case, Section 158(d)(1) permits appeals from "cases" *and* "proceedings" through its internal reference to Section 158(a). As both the Bankruptcy Code and longstanding usage make clear, a "proceeding" is a discrete judicial unit *within* a larger case. Second, Section 158(d)(1) permits appeals not only from final "decisions" but also final "judgments, orders, and decrees." As this Court has acknowledged, while a "judgment," or perhaps a "decision," must dispose of the entire matter before the court, "order" is a significantly broader term that refers to a judicial determination that resolves a dispute, even if they do not fully dispose of a matter.

As in the ordinary civil context, the requirement of "finality" in Section 158(d)(1) means that the order sought to be appealed must definitively resolve the substantive rights of the parties in a particular proceeding. But an order in bankruptcy may be final without resolving or disposing of all issues on the merits in the entire bankruptcy case.

In this case, the BAP's denial of plan confirmation was a final order that fully disposed of a discrete proceeding. Consistent with its treatment in the Code, the plan confirmation process in Chapters 11 and 13 is a distinct "proceeding" that begins when the debtor proposes a plan and ends when the plan is denied. If the debtor proposes another plan, a new proceeding begins over the confirmation of that plan. The bankruptcy court's order was "final" because it definitively determined petitioner's substantive right to the relief he sought, and it thereby resolved the discrete proceeding triggered by his proposed plan.

The court of appeals held that the denial of confirmation was not final because petitioner remained legally entitled to propose a new plan, which would entail significant further proceedings. But because plan confirmation *grants* are also frequently followed by significant further proceedings, including liberally permitted plan modifications and the claims allowance process, the court's logic threatens to undo the well-settled rule that grants of plan confirmation are appealable.

II. If direct appeal is unavailable to debtors from denials of confirmation, debtors will find it difficult or impossible to obtain appellate review of important legal rulings by any Article III court. The two alternatives to direct appeal offered by the court of appeals below are costly and unworkable.

The first alternative requires the debtor to move for and receive confirmation of a second, unwanted plan, and then appeal that confirmation order to obtain review of the earlier denial. This method assumes that a confirmable alternative plan exists.

Even if it does, confirmation of the substitute plan would lead to transactions, such as distributions by the trustee, on which creditors and others may have relied. Practical considerations and the Code itself would make it difficult or impossible to unwind those ensuing transactions if the appeal were successful. Courts are reluctant to stay confirmation orders in general, and they are likely to be especially reluctant to do so when the party that obtained the grant of confirmation is now seeking to stay it. In the end, a debtor who opts for this method runs the risk that relief will be unavailable.

The second alternative requires the debtor to seek or accept a dismissal of the entire case and then appeal that dismissal. But many courts will not review earlier interlocutory orders on appeal from a voluntary dismissal or dismissal for failure to prosecute. More importantly, absent a stay of the dismissal order, such an order would end the protections of the automatic stay, exposing the debtor to the very sorts of creditor collections that bankruptcy aims to avoid. This alternative, with such severe consequences, is not a viable route to appellate review of a denial of plan confirmation.

III. Permitting a debtor directly to appeal a denial of confirmation will have systemic benefits for the bankruptcy system. It will enable debtors to obtain correction of erroneous legal rulings that deny their entitlement to relief. Courts will be able to develop bankruptcy precedent and resolve conflicting authorities in bankruptcy law, to the benefit of debtors and creditors alike. Where such appeals are permitted, debtors, who by definition have scarce resources to

spend on litigation, have not burdened the courts with appeals on narrow factual or insignificant issues. Permitting debtors to appeal denials of confirmation will foster a more even-handed development of bankruptcy precedent than does the unfair asymmetry of allowing creditors to appeal grants of confirmation while denying that same right to debtors seeking to appeal denials.

Certified interlocutory appeals are not a substitute for direct appeal. Although they provide a useful safety valve for particular unusual cases in which immediate appeal from an interlocutory order is warranted, they cannot replace appeal as of right in a whole category of cases such as denials of confirmation. Moreover, the certification process itself burdens the courts and the parties with extra and wasteful litigation.

ARGUMENT

I. UNDER 28 U.S.C. § 158(d)(1), THE DENIAL OF PLAN CONFIRMATION WAS FINAL AND APPEALABLE AS OF RIGHT

Under 28 U.S.C. § 1291, which generally governs appeals in federal court, a judgment is final and appealable as of right if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). Unlike ordinary civil litigation, however, a bankruptcy case is an aggregation of discrete proceedings. 1 Collier on Bankruptcy ¶ 5.08[1][b], at 5-41 (16th ed. 2014). Appellate review of definitive, and possibly incorrect, rulings that determine the substantive rights of the parties and the distribution

of assets cannot await the final termination of the case.

For that reason, this Court has long "given [finality in bankruptcy] a more liberal, and . . . more reasonable construction, and one more consonant to the intention of the legislature" than the strict standard applicable in ordinary civil cases. *Forgay* v. *Conrad*, 47 U.S. (6 How.) 201, 203 (1848). "Virtually all decisions agree" that bankruptcy finality "is broader and more flexible than the concept applied in ordinary civil litigation." 16 Wright & Miller, Federal Practice & Procedure § 3926.2, at 270 (2d ed. 1996).[3]

Congress has codified that broader standard in the statute governing bankruptcy appeals, 28 U.S.C. § 158(d)(1). And this Court has held that *grants* of plan confirmation, *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 269 (2010), and rulings denying priority status to claims, *Howard Delivery Serv., Inc.* v. *Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006), neither of which concludes an entire bankruptcy case, are final and therefore appealable. The denial of plan confirmation in this case similarly satisfies Section 158(d)(1) and is therefore appealable as of right.

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[3] *See, e.g.*, *In re Saco Local Dev. Corp.*, 711 F.2d 441, 443-46 (1st Cir. 1983) (Breyer, J.); *In re Oakley*, 344 F.3d 709, 711 (7th Cir. 2003); *In re Millers Cove Energy Co., Inc.*, 128 F.3d 449, 451 (6th Cir. 1997); *In re Taylor*, 913 F.2d 102, 104 (3d Cir. 1990); *In re Chateaugay Corp.*, 880 F.2d 1509, 1511 (2d Cir. 1989).

A. Section 158(d)(1) Provides a Broader Right of Appeal Than Does Section 1291

A ruling refusing to confirm a plan does not resolve the entire bankruptcy case. Nonetheless, the text of 28 U.S.C. § 158(d)(1) authorizes appeal in smaller units than the entire case. That conclusion is especially clear when considered in light of bankruptcy's "tradition of appealability." *In re Saco Local Dev. Corp.*, 711 F.2d 441, 447 (1st Cir. 1983) (Breyer, J.).

1. In bankruptcy cases, a first-level appeal to a district court or BAP is permitted from "judgments, orders, and decrees" of bankruptcy courts that are "final" and are entered in "cases and proceedings." 28 U.S.C. § 158(a)-(b). Subsequently, a party can seek a second-level appeal to a federal court of appeals under 28 U.S.C. § 1291, which generally authorizes appeals to the federal courts of appeals, or 28 U.S.C. § 158(d)(1), which specifically authorizes bankruptcy appeals. *See Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992).

2. Section 1291, which traces its ancestry back to the Judiciary Act of 1789, applies generally to all cases in federal court. It provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. § 1291. Under Section 1291, an order is not a "final decision" if the court must undertake any significant further proceedings on the merits of the entire case. *See Catlin* v. *United States*, 324 U.S. 229, 233 (1945); *see also Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 438 (1956) (subject to Fed. R. Civ. P. 54(b), appeals proceed as a "single judicial unit"); *Saco*, 711 F.2d at

444 (noting Congress's willingness in Rule 54(b) to depart from the case-as-single-judicial-unit principle for reasons that similarly support broader appeal in the bankruptcy context). "[T]he statute's core application is to rulings that terminate an action." *Gelboim* v. *Bank of America*, No. 13-1174, slip op. at 2 (U.S. Jan. 21, 2015).

3. Section 158(d)(1), the bankruptcy-specific statute, provides that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section." 28 U.S.C. § 158(d)(1). Congress thus did not reprise Section 1291 "without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). Instead, Section 158(d)(1) expressly authorizes appeal from a wider range of judicial actions. By its internal reference to Section 158(a) and (b), Section 158(d)(1) permits appeals that cover not only entire "cases," but also individual "proceedings." Moreover, while Section 1291 requires a "final decision[]," Section 158(d)(1) permits appeal more broadly of "final decisions, judgments, orders, and decrees."

4. Section 1291 hinges appeal on a single phrase—"final decisions"—and this Court therefore has not had to consider the separate import of each word in that phrase. But since Congress included several broader alternative terms in Section 158(d)(1), it is necessary to take a closer look at each of them. *See Leocal* v. *Ashcroft*, 543 U.S. 1, 12 (2004) ("[W]e must give effect to every word of a statute wherever possible[.]"). The broader phrasing of Section 158(d)(1) provides for the right to appeal a wider range of judicial actions than in ordinary civil litigation.

a. *Proceedings.* There has been an "uninterrupted tradition of judicial interpretation in which courts have viewed a 'proceeding' within a bankruptcy case as the relevant 'judicial unit' for purposes of finality." *Saco*, 711 F.2d at 445. This Court has similarly held that "orders in bankruptcy cases may be immediately appealed if they finally dispose of *discrete disputes within the larger case*." *Howard Delivery*, 547 U.S. at 657 n.3 (quoting *Saco*, 711 F.2d at 444) (internal quotation marks omitted). Those "discrete disputes" are "proceedings" under Section 158(a), and final "decisions" or "orders" in them are appealable under Section 158(d)(1). *See also* 28 U.S.C. § 1334(a)-(b) (giving district courts appellate jurisdiction over bankruptcy "cases" and, separately, "proceedings").

The bankruptcy appellate statutes have always used the term "proceedings" to mean "[a]n act or step that is part of a larger action." Black's Law Dictionary 1324 (9th ed. 2009). The Bankruptcy Act of 1898 illustrates its scope. Section 24a of the Act gave the courts of appeals "appellate jurisdiction of *controversies* arising in bankruptcy *proceedings* from the courts of bankruptcy," Act of July 1, 1898, ch. 541, § 24a, 30 Stat. 544, 553 (emphases added), and Section 24b provided jurisdiction "either interlocutory or final, to superintend and revise in matter of law the *proceedings*" of the bankruptcy courts, *id.* § 24b (emphasis added). In *Taylor* v. *Voss*, 271 U.S. 176, 180-81 (1926), this Court specifically contrasted the two provisions, explaining that, while "controversies" in Section 24a referred to entire actions, the term "proceedings" in Section 24b "[we]re those matters of an administrative character . . . presented in the ordinary course of the administration of the bankrupt's estate." Thus, the

term was not limited to the ultimate liquidation of the estate or reorganization of the debtor, or even the final resolution of any particular claim by or against the debtor. *See Saco*, 711 F.2d at 444-45.

Aside from Section 158, the bankruptcy statutes frequently refer to "proceedings" in contexts making clear that a "proceeding" is a part of a broader "case." *See, e.g.*, 11 U.S.C. §§ 305, 325, 742, 921(e); 28 U.S.C. § 157(a). A key Code provision, 28 U.S.C. § 157(b), designates a series of components of a bankruptcy case as "core proceedings" for which bankruptcy courts can "enter appropriate orders and judgments." *See also* Black's Law Dictionary 1324 (9th ed. 2009) ("*Bankruptcy*. A particular dispute or matter arising within a pending case—as opposed to the case as a whole").

b. *Decisions, judgments, orders, and decrees.* While Section 1291 applies only to final "decisions," Section 158(d)(1) applies more broadly to "final decisions, judgments, orders, and decrees."

(*i.*) A "judgment" is "[a] court's final determination of the rights and obligations of the parties in a case." Black's Law Dictionary 918 (9th ed. 2009). It therefore finally disposes of an entire case before the court. The term "decree" carries the same force, usually in equity actions. *See id.* at 471 (defining "decree" as "a judicial decision in a court of equity, . . . similar to a judgment of a court of law"); Fed. R. Bankr. P. 3022 ("After an estate is fully administered in a chapter 11 reorganization case, the court . . . shall enter a final decree closing the case."). A "decision" is "[a] judicial or agency determination after consideration of the

facts and law; esp., a ruling, order or judgment pronounced by a court when considering or disposing of a case." Black's Law Dictionary at 467. The term "decision" thus refers *either* to a judgment that concludes a case *or* to an earlier ruling in the case.

"Order" is broader than the other terms in Section 158(d)(1). It is defined as "the mandate or determination of the court upon some subsidiary or collateral matter arising in an action, *not disposing of the merits, but adjudicating a preliminary point or directing some step in the proceedings.*" *Id.* at 1206 (emphasis added) (quoting 1 Henry Campbell Black, A Treatise on the Law of Judgments § 1, at 5 (2d ed. 1902)) (internal quotation marks omitted). Most significantly, an "order" need not terminate or dispose of the case; it can decide just a particular matter in controversy. For example, the "collateral order doctrine" defines appealable final orders that do *not* dispose of an entire case. *See, e.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511, 524-30 (1985). Congress's extension of appellate rights to "orders" in addition to "decisions," "judgments," and "decrees," confirms the broader scope of appeal rights in bankruptcy.

(*ii.*) This Court gave effect to the difference between "orders," on the one hand, and "judgments," on the other, when interpreting its own jurisdiction under previous appellate statutes. The Judiciary Act of 1789 granted this Court appellate jurisdiction over "final judgments and decrees" from the circuit courts generally, ch. 20, § 22, 1 Stat. 73, 84, but Congress gave this Court special jurisdiction over "any final judgment, *order* or decree" from the Circuit Court for the District of Columbia, Act of Feb. 27, 1801, ch. 15,

§ 8, 2 Stat. 103, 106 (emphasis added). In *Custiss* v. *Georgetown & Alexandria Turnpike Co.*, 10 U.S. (6 Cranch) 233, 235 (1810), the Court held that the latter statute's wording was "more ample than [that] employed in the judicial act." The inclusion of the term "order" in the statute gave the Court jurisdiction it otherwise would have lacked over the denied land assessment at issue. Section 158(d)(1) similarly authorizes appeal of "orders," encompassing a class of rulings distinctly broader than "decisions" or "judgments."

c. *Final.* In light of bankruptcy's historic recognition of broader appeal rights, reflected in Congress's use of the terms "proceedings" and "orders" in the bankruptcy appellate statutes, the term "final" in Section 158(d)(1) has a similar, but broader, meaning than in Section 1291. An order must dispose of a "discrete dispute" in order to be final. But an order may be final without determining *all* of the rights of *all* of the parties to the *entire* bankruptcy case.

As is true outside bankruptcy, rulings that are tentative, address procedural issues, or otherwise do not conclusively determine substantive rights are not final. The relevant "finality" inquiry is whether the lower court fully and conclusively determined the substantive rights of the parties with respect to the proceeding in question. *See Beebe* v. *Russell*, 60 U.S. (19 How.) 283, 284 (1856) ("[T]he rights of the parties have been fully and finally determined.").[4] In bankruptcy, the ruling must be a "'final determination of

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[4] In cases construing the finality requirement under Section 1291 in the context of the collateral-order doctrine of *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), the Court

the rights of the parties to secure the relief they seek in th[e] suit' . . . or the order must dispose of a discrete dispute within the larger bankruptcy case." *In re Tex. Extrusion Corp.*, 844 F.2d 1142, 1155 (5th Cir. 1988) (citations omitted). Such rulings "are so distinctive and conclusive either to the rights of individual parties or the ultimate outcome of the case that final decisions as to them should be appealable as of right." *In re Bonham*, 229 F.3d 750, 761 (9th Cir. 2000) (citation and internal quotation marks omitted).

B. The BAP's Denial Was a Final Order in a Discrete Proceeding

Under the above principles, the denial of plan confirmation in this case was final and appealable. The BAP's ruling was an order, it disposed of the discrete dispute or proceeding triggered by petitioner's proposal of the hybrid plan, and it definitively denied petitioner the relief he sought. Indeed, addressing his mortgage debt through a hybrid plan was the key relief petitioner sought in this case, and the BAP's order conclusively denied him that relief.

1. *The BAP's order resolved a distinct proceeding.* The procedural requirements of the plan confirmation process in Chapter 13 demonstrate that a distinct pro-

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has similarly required that collateral orders must not be "tentative, informal, or incomplete." "[A]lthough technically amendable," they must be "made with the expectation that they will be the final word on the subject addressed." *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 277 (1988) (citation and internal quotation marks omitted).

ceeding begins when a debtor proposes a plan and terminates with its denial. Within fourteen days of filing a Chapter 13 petition, the debtor must file a plan with the bankruptcy court. Fed. R. Bankr. P. 3015(b); *see* 11 U.S.C. § 1321. Then, within 45 days of a meeting of creditors, the court must hold a formal hearing on the plan, at least if there has been an objection. 11 U.S.C. § 1324. Following the hearing, the bankruptcy court "shall confirm a plan" if it satisfies the requirements of 11 U.S.C. § 1325. If the debtor proposes a new plan after a denial, it starts the process all over again. *See* Pet. App. 8a. "[A]ny remand would be for new proceedings and factual findings independent of the legal conclusion upon which the bankruptcy court based its decision to deny" the plan. *In re Lendvest Mortgage, Inc.*, 42 F.3d 1181, 1183 (9th Cir. 1994).[5]

Treating the process leading to denial of plan confirmation as a distinct "proceeding" is consistent with the way the term fits within the statutory scheme as a whole. Section 157 provides that "core proceedings," which the bankruptcy court may decide itself regardless of the consent of the parties, "include, but are not limited to" a number of matters, including "confirmations of plans." 28 U.S.C. § 157(b)(2)(L). This Court has explained that "[i]f a matter is core, the statute empowers the bankruptcy judge to enter final judgment on the claim, subject to appellate review by the district court." *Executive Benefits Ins. Agency* v. *Arkison*, 134 S. Ct. 2165, 2172 (2014).

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[5] While the timing varies, the plan confirmation process in Chapter 11 proceeds similarly. *See* Fed. R. Bankr. P. 3020(b) (filing and hearing), 9014 (procedures).

Section 157(b)(2)'s non-exhaustive list describes the entire plan confirmation process as a "core proceeding," whatever its result. There is no basis to conclude that it excludes, by implication, the process that leads to *denial* of confirmation. After all, a confirmation and a denial resolve the same discrete dispute: whether the proposed plan complies with the Code. In either scenario, the court determines how much the debtor or estate must pay and to whom. *See* 11 U.S.C. § 1129(a); *id.* § 1325(a)(1).

Moreover, the basic structure of bankruptcy litigation recognizes that the denial ends a discrete proceeding. Respondent's objection to petitioner's plan initiated a "contested matter" in bankruptcy. *See* Fed. R. Bankr. P. 3015, 3020 (any objection to a plan confirmation must be "governed by Rule 9014," which concerns procedure "in a contested matter," Fed. R. Bankr. P. 9014(a)). Any objection to a subsequently proposed plan after the denial would initiate a new "contested matter," which is consistent with treating the denial of confirmation as concluding a discrete proceeding.

As explained below, direct appeal of the denial of plan confirmation may be the debtor's only real opportunity to obtain review of that potentially crucial and dispositive legal ruling. *See* pp. 28-42, *infra*. *Cf. Matthews* v. *Eldridge*, 424 U.S. 319, 331 n.11 (1976) ("[S]tatutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered. . . ."). For that reason, too, the process of determining the validity of a given plan,

whether it leads to grant or denial of the plan, constitutes a distinct proceeding whose resolution may be appealed.

2. *The BAP's order was final.* The BAP's ruling was "final" under Section 158(d)(1), because it definitively ruled on petitioner's substantive right to secure the relief he sought in the confirmation proceeding. The bankruptcy court, after extensive consideration, concluded without qualification that a hybrid plan "cannot be confirmed over the creditor's objection." Pet. App. 66a. The BAP agreed that "[petitioner's] hybrid plan cannot be confirmed." Pet. App. 36a. The rulings of both courts denied petitioner the relief he sought—*i.e.*, plan confirmation, allowing him to emerge from bankruptcy with a lower balance on his mortgage. No further proceedings on petitioner's plan are necessary or possible.

C. The Court of Appeals' Reasons for Refusing to Permit Appeals of Denials of Plan Confirmation Are Mistaken

1. The court of appeals acknowledged that Section 158(d)(1) permits appeals of "proceedings" smaller than the entire bankruptcy case. Following *Saco*, 711 F.2d at 444-46, and this Court's decision in *Howard Delivery*, 547 U.S. at 657 n.3, the court correctly viewed the appealable judicial unit as a "discrete dispute" within the larger bankruptcy case. Pet. App. 5a. In the court's view, however, the denial was just one step in a "larger proceeding" leading toward a theoretical future plan confirmation, because petitioner remained legally "free to propose an amended plan." Pet. App. 7a. Thus, in the court's view, the denial

"would, at most, finally resolve a discrete *issue*," rather than a "discrete *dispute*." Pet. App. 7a n.5 (emphases added). For that reason, the court thought the denial was not appealable.

The court erred. As explained above, a denial of confirmation is most sensibly viewed as an order conclusively disposing of a proceeding or discrete dispute, which begins when the debtor proposes a plan, proceeds through the prescribed steps, and ends when a court either grants or denies confirmation.

2. The court of appeals' failure to recognize that a denial of confirmation is a final decision or order threatens significant untoward consequences. If the court of appeals were correct that denials of plan confirmation do not finally dispose of "discrete disputes" and so are not appealable, the same conclusion would follow for grants of plan confirmation. That conclusion, however, would be inconsistent with this Court's holding that a "Bankruptcy Court's order confirming [a] proposed plan [is] a final judgment." *United Student Aid Funds*, 559 U.S. at 269.[6]

The court of appeals reasoned that, following a denial, the debtor remains legally entitled to propose a new plan, which can lead to extensive further proceedings that are clearly on the merits and in no sense

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[6] The courts of appeals had reached the same conclusion before *United Student Aid Funds*. *In re Zahn*, 526 F.3d 1140, 1142-43 (8th Cir. 2008); *In re Transtexas Gas Corp.*, 303 F.3d 571, 579 (5th Cir. 2002); *In re Interwest Bus. Equip., Inc.*, 23 F.3d 311, 315 (10th Cir. 1994); *Kham & Nate's Shoes No. 2, Inc.* v. *First Bank of Whiting*, 908 F.2d 1351, 1354-55 (7th Cir. 1990); *In re Pizza of Haw., Inc.*, 761 F.2d 1374, 1378 (9th Cir. 1985); *Maiorino* v. *Branford Sav. Bank*, 691 F.2d 89, 91 (2d Cir. 1982).

"mechanical or ministerial." Pet. App. 8a (quoting *In re Lindsey*, 726 F.3d 857, 859 (6th Cir. 2013). But a plan confirmation too can, and usually does, lead to extensive further proceedings that are clearly on the merits of the bankruptcy case. In fact, "the confirmation of the plan is often just the first step toward finalization of the case. There are always issues to be resolved through additional litigation, such as avoidance actions, claims allowance, compliance with or consummation of the plan, and interpretation and enforcement of the rights created under the plan." Rhett G. Campbell, *Issues in Litigation*, 1 J. Bankr. L. & Prac. no. 1, at 94 (1991).

For example, even when a plan is confirmed, it is subject to change in a wide variety of circumstances, unlike any final judgment in a civil case. *See* Fed. R. Civ. P. 60(b). "At any time after confirmation of the plan," debtors, trustees, and unsecured creditors alike may seek to have the plan modified. 11 U.S.C. § 1329(a); *see also id.* § 1127(b). Such modifications may be significant, such as "increas[ing] or reduc[ing] the amount of payments on claims of a particular class provided for by the plan" and "extend[ing] or reduc[ing] the time for such payments." 11 U.S.C. § 1329(a).[7] These modifications are not uncommon; they frequently result from changed circumstances, such as a change in employment or other income, or

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[7] In Chapter 11, the plan proponent or the reorganized debtor may propose any modification before substantial consummation of the plan. *See* 11 U.S.C. § 1127(b). In addition, an individual Chapter 11 debtor may modify a plan at any time to increase or decrease the amount or time period of payments. *See* 11 U.S.C. § 1127(e).

changed expenses for health, support of dependents, or business expenses. *See* 11 U.S.C. § 1325(b)(2) (definition of "disposable income"); *see also, e.g.*, Henry E. Hildebrand III, *The Debtor and the Blown Engine*, Am. Bankr. Inst. J., July-Aug. 2001, at 18.

Moreover, claims proceedings at the core of a bankruptcy case often take place *after* plan confirmation in Chapter 13 cases. *See* 1 Grant Gilmore & David Gray Carlson, Gilmore & Carlson on Secured Lending: Claims in Bankruptcy § 14.04, at 946 (2d ed. 2000). Within fourteen days of filing a Chapter 13 petition, the debtor must propose a plan. Fed. R. Bankr. P. 3015(b). While the court has 45 days after the first meeting of creditors to hold a confirmation hearing on the debtor's proposed plan, 11 U.S.C. § 1324, creditors have 90 days after the meeting to file their proofs of claim against the debtor's estate. Fed. R. Bankr. P. 3002(c). In petitioner's case, the confirmation process was extended by the need to file amended plans, so it occurred after the claims process had been completed. But because of the expedited confirmation process in Chapter 13, claims litigation frequently postdates plan confirmation. *See, e.g., In re Duggins*, 263 B.R. 233, 236 (Bankr. C.D. Ill. 2001); *In re Gordon*, 471 B.R. 614, 619 (D. Colo. 2012), *vacated on other grounds*, 743 F.3d 720 (10th Cir. 2014), *petition for cert. filed*, No. 13-1416.

A great deal of other litigation on the merits of the larger bankruptcy case also takes place after plan confirmation. In Chapter 13 cases, a debtor does not receive a discharge until "completion by the debtor of all payments under the plan," ordinarily almost three to five years after the plan was proposed. 11 U.S.C.

§ 1328(a).[8] Even after confirmation, the bankruptcy court may conduct significant further proceedings that are undoubtedly on the "merits" to dismiss or convert the case and reinstate creditors' claims to their original amounts. Charles Tabb, The Law of Bankruptcy 1264-677 (3d ed. 2014); *see also* 11 U.S.C. § 1307(c)(6).

3. Thus, the rationale for the court of appeals' holding that *denials* of confirmation are nonappealable would threaten the settled rule permitting appeals of *grants* of plan confirmation. Both grants and denials of confirmation are embedded in a larger bankruptcy case, and both can be and usually are followed by significant further proceedings on the merits of the case and even on the plan itself. If the process leading to a denial of plan confirmation is not a separate proceeding or discrete dispute, neither is the process leading to a grant of plan confirmation. That result would overturn this Court's holding in *United Student Aid Funds* (and the uniform view of the lower courts) that grants of plan confirmation are final and appealable under Section 158(d)(1).

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[8] The debtor generally must begin making payments prior to confirmation and within 30 days of filing the plan, 11 U.S.C. § 1326(a)(1), and must generally continue making payments for three or five years, 11 U.S.C. § 1322(d).

II. ELIMINATING DIRECT APPEAL OF PLAN CONFIRMATION DENIALS WOULD MAKE IT DIFFICULT OR IMPOSSIBLE FOR DEBTORS TO OBTAIN ANY REVIEW

The First Circuit's decision eliminates the ordinary and straightforward path to appellate review of an order that frequently will be, and was here, of decisive importance in the case. Courts that have held that such direct review is unavailable have proposed, however, that "rejection of [a] debtor['s] proposed plan may yet be considered on appeal from a final judgment either confirming an alternative plan, or dismissing the underlying petition or proceeding." *Gordon* v. *Bank of America, N.A.*, 743 F.3d 720, 724 (10th Cir. 2014), *petition for cert. filed*, No. 13-1416 (citation and internal quotation marks omitted); *see* Pet. App. 7a, 8a-9a, 9a-10a.

Both of those roundabout routes to review would be costly and could leave all parties in a procedural tangle with unfortunate and irreversible consequences. Most importantly, they could effectively eliminate the debtor's ability to obtain review of mistaken, dispositive legal rulings at the core of the case. Impeding or eliminating appellate review is of particular concern in this context, because it obstructs or eliminates a debtor's sole route to an Article III court for review of potentially dispositive legal rulings. *See Martin* v. *Hunter's Lessee*, 14 U.S. 304, 333-34, 339-40, 342 (1816) (Story, J.); *see also Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 848 (1986).

A. Requiring the Debtor to Obtain and Then Appeal Confirmation of a Second, Unwanted Plan in Order to Obtain Review of an Earlier Denial of Confirmation is Costly, Unworkable, and Ineffective

Under one of the First Circuit's suggested alternatives to direct appeal, a debtor whose plan has been denied must develop an alternative plan, move for its confirmation, address and litigate any objections that are filed, and obtain a favorable ruling. Only then can the debtor, under the guise of appealing the grant of his own motion to confirm, obtain review of the court's refusal to confirm the first plan. As Bank of America—speaking as a bankruptcy creditor—argued in a brief supporting a grant of certiorari in a similar case to this one, "[e]ven if the debtor eventually obtains review by this tortuous route, it may come too late, since changing circumstances may prevent the debtor from reinstating his preferred plan." *See* Br. of Bank of America at 22-23, *Gordon* v. *Bank of America*, No. 13-1416, *petition for cert. filed*, May 21, 2014. The end result is that this alternative is likely to be illusory.

1. *An acceptable, confirmable new plan may not exist.* Requiring confirmation of a new plan to obtain review of a denied one rests on the faulty assumption that an alternative, acceptable, and confirmable plan exists. In many cases, the denial may rest on a ground that would equally preclude any other plan that could be confirmed and would accomplish any of the debtor's goals. Yet without such an alternative, a debtor like petitioner could not pursue the appeal-a-later-plan mechanism suggested by the court of appeals to obtain review of the denial. *See* Pet. App. 44a

("[I]t appears that [petitioner] is correct in suggesting that he could not realize confirmation of a subsequent amended plan.").

2. *A confirmed plan can have immediate effects and create reliance interests.* Even if a plan is available and confirmed, the new plan's confirmation frequently has immediate and irreversible effects.

a. *Direct consequences.* In Chapter 13, where the debtor begins making payments to the trustee at the outset of the case, 11 U.S.C. § 1326(a)(1), the trustee must distribute those payments to creditors "as soon as is practicable" upon confirmation of the plan. *Id.* § 1326(a)(2). In Chapter 11, upon confirmation, the debtor must "carry out the plan," which ordinarily requires distributing assets to creditors. *Id.* §§ 1123, 1142. If the debtor fails to do so, the "court may direct the debtor . . . to effect a transfer of property dealt with by a confirmed plan." *Id.* § 1142(b).

This has immediate and often irreversible consequences for the parties. For example, in *Holywell Corp.* v. *Smith*, 503 U.S. 47, 51 (1992), when the Chapter 11 "plan took effect," the "trustee . . . immediately sold [the debtor's property] to the Bank in consideration for cash," and "then distributed these and other assets to third-party creditors." The consequences of a post-confirmation property disposition are borne not only by the debtor, but also by shareholders, creditors, or other interested parties. *See, e.g.*, *Nordhoff Invs., Inc.* v. *Zenith Elec. Corp.*, 258 F.3d 180, 184 (3d Cir. 2001) ("[M]uch of the [$300 million company's Chapter 11] plan was executed between November 5, when the Court confirmed, and

November 10, when [a large shareholder] was first notified."). Retrieving funds or other assets for the estate when it turns out that the debtor's first plan should have been confirmed may be difficult or impossible.

b. *Reliance interests.* Particularly in Chapter 11 cases, parties before the court as well as third parties rely on plan confirmation orders to make countless important financial decisions. These include issuing "new stock and membership interests," *In re United Producers, Inc.*, 353 B.R. 507, 511 (B.A.P. 6th Cir 2006), "advanc[ing] funds based on the new capital structure laid out in the reorganization plan," *Bosiger* v. *U.S. Airways*, 510 F.3d 442, 449 (4th Cir. 2007), and undertaking "countless post-confirmation transactions valued in the billions of dollars." *In re Delta Air Lines, Inc.*, 386 B.R. 518, 529 (Bankr. S.D.N.Y. 2008).

Unsurprisingly, courts are reluctant to disturb these reliance interests by undoing confirmed plans. *See In re Reliable Drug Stores, Inc.*, 70 F.3d 948, 951 (7th Cir. 1995); *In re UNR Industries*, 20 F.3d 766, 769-771 (7th Cir. 1994). This Court has long emphasized the need to "ensure a . . . close of the proceedings in each case in bankruptcy" and to protect not only "the interests of the creditors," but also "the rights of third persons." *Ex parte Christy*, 44 U.S. 292, 312 (1845). Reviewing courts view the prospect of unraveling bankruptcy plans especially warily because the "upsetting of reliance interests could ultimately reduce the incentives for anyone to participate in the bankruptcy process." *Bosiger*, 510 F.3d at 449.

3. *The Bankruptcy Code and the equitable mootness doctrine make it difficult to undo a confirmed plan.*

a. *The Code.* The Code recognizes confirmation's significance by providing a debtor with pre-confirmation protections while imposing on him post-confirmation liabilities. Those liabilities and unjustified additional costs could significantly burden a debtor forced to seek review by appealing confirmation of a later plan.

After a debtor has filed the petition but before the court has confirmed a plan, the Code's automatic stay covers "any act to obtain possession of property of the estate." 11 U.S.C. § 362(a)(3). "Property of the estate" generally includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). As a result, "most assets become property of the estate upon commencement of a bankruptcy case." *Schwab* v. *Reilly*, 560 U.S. 770, 785 (2010). In Chapter 13 cases, "property of the estate" is an even broader term, including earnings and any other property acquired by the debtor while the case is pending. 11 U.S.C. § 1306(a).

Unless otherwise provided by its terms, "the confirmation of a plan vests all of the property of the estate in the debtor," generally removing that property from the scope of the automatic stay's protections. 11 U.S.C. § 1141(b); *id.* § 1327(b). In Chapter 13 cases, this feature of plan confirmation can expose the debtor's earnings to numerous actions that would have been barred pre-confirmation, such as a former spouse's collection of support payments, *see, e.g.*, *In re*

Dagen, 386 B.R. 777 (Bankr. D. Colo. 2008), and collection efforts by tax authorities, *see, e.g.*, *In re Linsenmeyer*, 280 B.R. 828, 829-31 (E.D. Mich. 2002). Many of these collection efforts could not easily, or ever, be undone if the debtor later prevailed on appeal.

Worse still for the debtor, plan confirmation burdens the debtor with certain costs. Section 363(m) of the Code provides that "the reversal or modification on appeal of an authorization . . . of [a trustee's] sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith," unless there is a stay of the authorization and sale or lease pending appeal. 11 U.S.C. § 363(m). That provision effectively moots appeals of confirmed plans where reversal of confirmation would require undoing the sale of the debtor's property. *See,* e.g., *In re Gucci*, 126 F.3d 380, 392 (2d Cir. 1997) ("Section 363(m) limits appellate review of a consummated sale . . . regardless of the merits of the legal arguments raised against it."); *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994) ("[T]he transaction survives even if it should not have been authorized in the first place.").

Because Chapter 11 plans commonly provide for such property sales, Section 363(m) impedes any appeal that requires confirming an unwanted plan. *See, e.g., In re Made in Detroit, Inc.*, 414 F.3d 576, 583 (6th Cir. 2005) ("[T]he sale of the [400-acre] Property . . . renders the Appellants' claims moot under 11 U.S.C. § 363(m)."). No debtor should have to run the risk of permanently losing his property merely in order to obtain review.

b. *Equitable mootness.* In the Chapter 11 context, the equitable mootness doctrine may prevent a reviewing court from granting the debtor relief or even from hearing his appeal. Equitable mootness, distinct from constitutional mootness, is a prudential doctrine unique to bankruptcy that "looks beyond impossibility to the consequences of a reversal and its effect on third parties who changed position in reliance on the sale order or to whether the transaction is too difficult or complex to unwind." 3 Collier on Bankruptcy ¶ 363.11, at 363-86 (16th ed. 2014). The doctrine recognizes that "reorganizations typically implement complex transactions requiring significant financial investment," and it is thus often true that "granting the requested relief would disrupt the effected plan or harm third parties." *In re Semcrude, L.P.*, 728 F.3d 314, 317 (3d Cir. 2013).

The very idea behind equitable mootness is to bar certain meritorious appeals. *See, e.g.*, *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 139 (2d Cir. 2005) ("We conclude that . . . the bankruptcy court erred in [rejecting appellants' objections to the plan]. Nevertheless, we affirm because this appeal is equitably moot."); *In re GWI PCS 1 Inc.*, 230 F.3d 788, 804 (5th Cir. 2000) ("Although the bankruptcy court possibly *erred* . . . [the appeal is] barred by equitable mootness."); *In re Club Ventures Invs. LLC*, 507 B.R. 91, 100 (S.D.N.Y. 2014) ("[E]ven assuming [appellant] was correct in assigning error to the Bankruptcy Court, the relief requested in this appeal would be moot."). Equitable mootness thus presents a serious obstacle to any suggested path to appealing a Chapter 11 denial of confirmation that requires confirming a second, unwanted plan.

4. *Confirming a plan solely to appeal it costs time and money that neither debtors nor courts have.* This Court has recognized that an important goal of bankruptcy is to "facilitate the *expeditious* and final disposition of assets, and thus enable the debtor (and the debtor's creditors) to achieve a fresh start." *Schwab* v. *Reilly*, 560 U.S. 770, 794 (2010) (emphasis added). "[C]onserving assets is an important concern in a bankruptcy proceeding." *United Student Aid Funds*, 559 U.S. at 278.

The First Circuit's rule contravenes those goals. Instead of permitting a debtor a clean and immediate appeal of a denial of confirmation, the rule forces the debtor to propose and secure confirmation of a new plan, and appeal that confirmation order—all in order to obtain review of the earlier, rejected plan. A debtor who follows each of those steps wastes judicial time and resources, puts reliant creditors and other third parties at risk, and exposes himself to the constant threat of mootness.

5. *The possibility of obtaining a stay does not remedy these difficulties.* A debtor may move for a stay pending appeal of a bankruptcy court's order, including a confirmation order. Fed. R. Bankr. P. 8007;[9] *see* Fed. R. Bankr. P. 8025 (stay pending appeal to court of appeals). Such a stay could potentially mitigate some of the consequences of requiring confirmation of a new plan in order to obtain review of an earlier denial.

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[9] The rules governing bankruptcy appeals were recently amended, effective December 1, 2014.

Obtaining a stay, however, will frequently be difficult for debtors in this situation, and it may be conditioned on the payment of a bond or other security that the debtor simply does not have. Fed. R. Bankr. P. 8007(c); *see, e.g.*, *In re Adelphia Commc'ns Corp.*, 361 B.R. 337 (S.D.N.Y. 2007) (granting a stay due to potential mooting effect of confirmation conditioned on a $1.3 billion bond); 10 Collier on Bankruptcy ¶ 8005.09, at 8005-7 to 8005-8 (16th ed. 2014). The motion for a stay "must ordinarily be presented to the bankruptcy judge"—*i.e.*, the same judge who denied the earlier plan and confirmed the new one. Fed. R. Bankr. P. 8005. The debtor must satisfy the typical stay factors, 10 Collier on Bankruptcy ¶ 8005.08, at 8005-6 to 8005-7 (16th ed. 2014), and the "burden on the [stay] movant is a 'heavy' one." *In re General Motors Corp.*, 409 B.R. 24, 30 (Bankr. S.D.N.Y. 2009); *see also Matter of 203 N. LaSalle St. P'ship*, 190 B.R. 595, 597 (N.D. Ill. 1995) (debtor could not "justify the extraordinary measure of entering a stay").

Because plan confirmation orders are designed to distribute the debtor's assets and foster significant reliance interests, courts generally are reluctant to stay confirmation orders pending appeal, even in the ordinary case in which a party seeks to stay a plan *proposed by another party*. *See In re Made in Detroit, Inc.*, 414 F.3d at 580 ("Every court which addressed the issue, including this one, denied the Debtor's motion for a stay of the bankruptcy confirmation pending appeal."); *In re Duval Cnty. Ranch Co.*, 155 B.R. 723, 724 (Bankr. S.D. Tex. 1993) (noting that debtors "sought a stay pending appeal from the Bankruptcy Court and the United States District Court seeking to

stay the operation of the creditor plan," but "[b]oth requests for stay were denied"). There is no reason to think that courts would be more open to a debtor's request for a stay of a plan *proposed by the debtor himself*.

Moreover, courts are unlikely to stay confirmation orders even where a plan provides for the immediate sale of the debtor's property—*i.e.*, where irreparable harm is most likely. *See, e.g.*, *In re Pac. Lumber Co.*, 584 F.3d 229 (5th Cir. 2009); *In re Manges*, 29 F.3d 1034, 1037-38 (5th Cir. 1994); *see also In re Target Graphics, Inc.*, 372 B.R. 866, 876 (E.D. Tenn. 2007) ("[I]t is clear that a denial of a stay pending appeal would cause [the debtor] irreparable harm; however . . . [T]he harm it will suffer does not justify the granting of a stay pending appeal.").[10] In short, it is unrealistic to rely on the possibility of obtaining a stay to mitigate the severe and potentially prohibitive costs of obtaining confirmation of an unwanted new plan in order to obtain review of an earlier denial.

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[10] In Chapter 11 cases, many courts do not treat even the risk of equitable mootness as irreparable harm. *See, e.g.*, *BDC Capital, Inc.* v. *Thoburn Ltd. P'ship*, 508 B.R. 633, 639 (E.D. Va. 2014) ("[T]he possibility that the appeal would become equitably moot does not constitute irreparable injury."); *In re Shenandoah Realty Partners, L.P.*, 248 B.R. 505, 510 (W.D. Va. 2000) ("[I]t is well settled that an appeal being rendered moot does not itself constitute irreparable harm." (citations and internal quotation marks omitted)).

B. Requiring the Debtor to Obtain Dismissal in Order to Appeal an Earlier Denial of Confirmation Is Costly, Unworkable, and Ineffective

Courts that have refused to permit appeals of denials of confirmation have also suggested that a debtor could seek or accept dismissal of the case and then attempt to appeal the dismissal on the ground that the earlier denial of confirmation was erroneous. This approach too is fraught with high risks and heavy costs for the debtor that are likely to make it impossible to obtain appellate review.

1. A debtor who seeks review of a denial of confirmation may simply refuse to propose a new plan and then accept a court-ordered dismissal, 11 U.S.C. § 1307(c)(3); 11 U.S.C. § 1112(b)(4)(F), or seek a voluntary dismissal of the case, 11 U.S.C. § 1307(b); 11 U.S.C. § 1112(b). Appealing such a dismissal, however, in order to obtain review of the prior denial would be difficult or impossible.

a. *Involuntary dismissal.* Courts generally take a sharply negative view of allowing parties to invite involuntary dismissals in order to appeal an interlocutory order. Most circuits have held that appeal of a dismissal for failure to prosecute may not be used "as an avenue for reaching issues which are not subject to interlocutory appeal as of right." *Hughley* v. *Eaton Corp.*, 572 F.2d 556, 557 (6th Cir. 1978).[11] Others oc-

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[11] *See, e.g., Sere* v. *Bd. of Trs. of Univ. of Ill.*, 852 F.2d 285, 288 (7th Cir. 1988) (refusing to permit merger after dismissal for refusal to proceed in order to avoid "reward[ing] a party for dilatory and bad faith tactics"); *Huey* v. *Teledyne, Inc.*, 608 F.2d

casionally permit earlier rulings to merge into the dismissal but hold that "interlocutory orders should not ordinarily merge with a final judgment dismissing an action for failure to prosecute." *Shannon* v. *Gen. Electric Co.*, 186 F.3d 186, 192 (2d Cir. 1999).[12] The Eighth Circuit generally permits such mergers. *See Hefti* v. *Comm'r of Internal Revenue*, 899 F.2d 709, 711-12 (8th Cir. 1990) (allowing merger in the tax context, "not without some trepidation"). Faced with that procedural landscape, debtors seeking review of an interlocutory denial of plan confirmation by inviting an involuntary dismissal would risk a complete, unappealable dismissal of their plan.

b. *Voluntary dismissal.* Debtors who seek a voluntary dismissal will be on similarly uncertain footing. Some circuits have held that an interlocutory order can merge with a final order granting a voluntary dismissal with prejudice.[13] Other circuits, however, do not allow review of interlocutory orders on appeal from a voluntary dismissal.[14] Attempting a voluntary

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1234, 1240 (9th Cir. 1979) (refusing to permit merger of earlier refusal to certify class into later dismissal for failure to prosecute); *Marshall* v. *Sielaff*, 492 F.2d 917, 919 (3d Cir. 1974) (permitting merger after dismissal for want of prosecution would "provide a means to avoid the finality rule embodied in 28 U.S.C.A. § 1291").

[12] *See also AdvantEdge Bus. Grp.* v. *Thomas E. Mestmaker & Assocs., Inc.*, 552 F.3d 1233, 1237-38 (10th Cir. 2009).

[13] *See, e.g., Martin* v. *Franklin Capital Corp.*, 251 F.3d 1284, 1289 (10th Cir. 2001); *Purdy* v. *Zeldes*, 337 F.3d 253, 258 (2d Cir. 2003); *Cashmere & Camel Hair Mfrs. Inst.* v. *Saks Fifth Ave.*, 284 F.3d 302, 308 (1st Cir. 2002).

[14] *See, e.g., Druhan* v. *Am. Mut. Life*, 166 F.3d 1324, 1326 (11th Cir. 1999); *Clos* v. *Corr. Corp. of Am.*, 597 F.3d 925, 928

dismissal to obtain review of a prior denial of confirmation is thus fraught with risk.

2. Even if debtors had a clean right to obtain review of a denial of confirmation by appealing a subsequent dismissal, the dismissal itself would place additional burdens on debtors. Most significantly, dismissing the case ends the automatic stay, "one of the fundamental debtor protections provided by the bankruptcy laws." *Midlantic Nat'l Bank* v. *N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 503 (1986) (citation and internal quotation marks omitted); *see* 11 U.S.C. § 362(c)(2) ("[T]he [automatic] stay . . . continues until . . . the time the case is dismissed."). Accordingly, as soon as the dismissal occurs, creditors may foreclose on loans, obtain judgments against the debtor, and attempt to satisfy them by seizing property, garnishing wages, and the like. The accompanying free-for-all could create inequities among creditors, and it could easily make any effort to obtain an appellate reversal and confirmation of the rejected plan entirely futile. As the BAP here explained, "[i]f a debtor cannot obtain a stay of the dismissal pending appeal, this option could potentially result in the loss of the property," a result that "would not only irreparably harm the Debtor but would significantly alter his incentive to pursue an appeal." Pet. App. 44a.

The debtor may move for a stay of the dismissal pending appeal. As already noted, however, such stays may be conditioned on the payment of a bond or

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(8th Cir. 2010); *Fairley* v. *Andrews*, 578 F.3d 518, 521-22 (7th Cir. 2009); *Page Plus of Atlanta, Inc.* v. *Owl Wireless, LLC*, 733 F.3d 658, 662 (6th Cir. 2013).

other security that the debtor does not have. Fed. R. Bankr. P. 8007. And debtors who have voluntarily dismissed their cases or invited involuntary dismissal are in a poor position to convince a court that they should be entitled to the continued protection of the automatic stay.

3. Finally, inviting dismissal means the fate of the entire bankruptcy rides on the debtor's appeal. Ordinarily, losing an appeal before the end of the case would still leave the bankruptcy court able to resolve the bankruptcy. Here, however, a loss on appeal would affirm the dismissal and terminate the bankruptcy proceedings. The debtor would then have forfeited all of the benefits, for debtor and creditors alike, that orderly resolution of the bankruptcy could have provided.

While a debtor could in theory attempt to file a new bankruptcy petition to retain those benefits, there would be significant obstacles to doing so. Under 11 U.S.C. § 109(g), the debtor may be barred from filing a new case for 180 days if the dismissal was for "willful failure . . . to appear before the court in proper prosecution of the case" or if a creditor had earlier "fil[ed] a request for relief from the automatic stay." Even if the debtor were permitted to file a new case, the benefits of the automatic stay could be sharply curtailed or eliminated under 11 U.S.C. § 362(c)(3) or (4).[15]

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[15] 11 U.S.C. § 362(c)(3) provides generally that, if a debtor files a new case within one year of a dismissal, the automatic stay of actions "with respect to a debt or property securing such debt or with respect to a lease shall terminate" 30 days after the filing of the new case. 11 U.S.C. § 362(c)(4) generally eliminates

4. In short, a debtor is unlikely to be able to obtain review of a denial of confirmation by inviting or asking for a dismissal of the bankruptcy case. Courts may well refuse to consider the validity of an earlier denial on appeal of a later dismissal. Meanwhile, the debtor would lose the crucial protection of the automatic stay. Trying to obtain a stay of the dismissal and continued operation of the automatic stay would likely be futile. Even without all of those obstacles, the debtor would be risking the loss of all bankruptcy protection if the court of appeals determined that the denial of confirmation was valid.

III. ALLOWING APPEAL OF DENIALS OF CONFIRMATION WOULD BENEFIT THE BANKRUPTCY SYSTEM

The right to appeal is a "crucial safeguard." *Republic Nat'l Bank of Miami* v. *United States*, 506 U.S. 80, 92 (1992). This Court has recognized the right's wide-reaching importance, from correcting errors, *I.N.S.* v. *Rios-Pineda*, 471 U.S. 444, 450 (1985); *Adams* v. *Crittenden*, 133 U.S. 296, 298 (1890), to ensuring uniform legal rules. *Ex parte Yerger*, 75 U.S. 85, 102-03 (1868). The court of appeals' ruling threatens the ability of debtors to obtain correction of erroneous rules of decision that determined the disposition of their claims to relief. It also deprives the bankruptcy system of the ability to develop legal precedents and rules evenhandedly, for the benefit of the parties and the courts. As Bank of America explained in its brief

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the automatic stay altogether if the debtor has had two dismissals within the year before the filing.

in the *Gordon* case now pending on petition for certiorari in this Court, "the legal rulings governing what the plan may or may not provide are thus of the utmost importance to *all* parties in interest—as is the ability to obtain effective appellate review of those rulings." 13-1416 Br. of Bank of America 2 (emphasis added).

A. Allowing Appeals of Denials of Plan Confirmation Will Permit Debtors to Obtain Appellate Review of Important Legal Issues Without Overburdening Appellate Courts

1. Debtors by definition are likely to be short of funds and therefore reluctant or unable to appeal. In addition to the administrative costs of appeal, debtors must pay their attorneys, whose fees are "categorized and allowed as administrative expenses and receive first distribution priority over most other claims." David S. Kennedy, et al., *Attorney Compensation in Chapter 13 Cases and Related Matters*, 13 J. Bankr. L. & Prac. no. 6 at 1, 11 (2004). Thus, debtors are unlikely to appeal narrow or purely factual rulings, which receive deference on appeal.

2. Experience confirms that debtors generally appeal denials of confirmation only when, as in this case, they are based on legal rulings that are the subject of disagreement in the courts. That is true of the underlying issues in most of the cases in which the courts of appeals have addressed the appealability of denials of confirmation.

In this case, for example, the BAP acknowledged that "Massachusetts bankruptcy courts are split on

the issue of hybrid plans"—the subject of petitioner's appeal—and that "[d]ecisions elsewhere are in disarray" on the issue. Pet. App. 23a. The First Circuit similarly noted that this appeal involved a "pure question of law that is unsettled in this circuit." *Id.* at 10a. In cases addressing the appealability of denials of confirmation in the Second,[16] Fourth,[17] Fifth,[18] Sixth,[19] and Tenth[20] Circuits, the underlying legal issues were significant ones on which bankruptcy (and other) courts were divided.

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[16] *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996), addressed "a disputed issue that [wa]s a question of first impression."

[17] *Mort Ranta* v. *Gorman*, 721 F.3d 241 (4th Cir. 2013), reversed a bankruptcy court decision on whether social security payments could be included in income, an issue that has arisen elsewhere and has divided the courts. *Compare In re Worthington*, 507 B.R. 276, 278 (Bankr. S.D. Ind. 2014) ("The majority of circuits which have addressed this issue have likewise ruled social security benefits are not includable.") *with In re Melander*, 506 B.R. 855, 860 (Bankr. D. Minn. 2014) ("Debtors are essentially in control of the amount of Social Security that they are voluntarily willing to contribute to their plan[.]").

[18] *In re Bartee*, 212 F.3d 277, 289 (5th Cir. 2000), noted the "magnitude and evenness of the split in authority, . . . extend[ing] to the leading bankruptcy treatises," on the "cramdown" issue before it.

[19] *In re Lindsey*, 726 F.3d 857, 858 (6th Cir. 2013), rejected an appeal of denial of plan confirmation on an issue regarding the absolute priority rule that had been the subject of opposing views canvassed by the bankruptcy court. *See In re Lindsey*, 453 B.R. 886, 903 (Bankr. E.D. Tenn. 2011).

[20] The Tenth Circuit in *Gordon* was unable to resolve an issue that the bankruptcy court in that case had noted had split courts around the country, was "very important for very, very many plans," and was an issue on which "we really need some

3. Nor would permitting appeals of denials of confirmation threaten to overburden appellate courts. For example, even though the Fifth Circuit has permitted appeals from denials of plan confirmation since at least 2000, *see In re Bartee*, 212 F.3d 277, 283 (5th Cir. 2000), we have been able to find only three decisions since then involving an appeal from a denial of plan confirmation to the Fifth Circuit.[21] Appeals from denials of plan confirmation to the district courts in the Fifth Circuit are similarly scarce: we have found only two, in addition to those that were then appealed to the Fifth Circuit.[22] The Fourth Circuit has decided no cases on appeal from denials of confirmation since its July 2013 decision in *Mort Ranta* v. *Gorman*, 721 F.3d 241, 248 (4th Cir. 2013), which confirmed that such appeals are available. We have found only one case since *Mort Ranta* in which a district court in that circuit has assumed jurisdiction

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guidance" from the court of appeals. 13-1416 Pet. 31-32 (quoting 13-1416 Resp. C.A. Mem. Br. 7-8).

[21] The references in this paragraph are all limited to cases available on Westlaw. The three cases are *In re Crager*, 691 F.3d 671, 674-75 (5th Cir. 2012); *In re Nowlin*, 576 F.3d 258, 261 (5th Cir. 2009); and *In re Stanley*, 224 F. App'x 343, 345 (5th Cir. 2007).

[22] All three cases in the preceding footnote were appeals of district court rulings. In *Crager* and *Stanley*, the district court ruling was on an appeal from a grant of plan confirmation; in *Nowlin*, it was an appeal from a denial of plan confirmation. The two additional district court cases are *Mariah Bay Leasing Corp.* v. *Credit Union Liquidity Services, Inc.*, 2011 WL 2586761, at *1 (N.D. Tex. June 29, 2011), and *Spalding* v. *Truman*, 2008 WL 4566459, at *1 (N.D. Tex. Oct. 14, 2008).

over an order denying confirmation.[23] Permitting appeals from denials of plan confirmation therefore will not overburden the courts of appeals.

B. Allowing Appeals of Denials of Plan Confirmation Will Permit Courts of Appeals to Serve Their Important Function of Developing and Harmonizing the Law

The lack of binding precedent has long been considered a serious problem in bankruptcy. Judith A. McKenna & Elizabeth C. Wiggins, Fed. Judicial Ctr., Alternative Structures for Bankruptcy Appeals 1-2, 7 (2000). Both Congress and the courts have observed the "widespread unhappiness at the paucity of settled bankruptcy-law precedent." *Weber* v. *United States Trustee*, 484 F.3d 154, 158 (2d Cir. 2007); *cf. United States* v. *Mersky*, 361 U.S. 431, 435-36 (1960).

Permitting appeals of denials of confirmation gives the courts of appeals the opportunity to develop and harmonize the law. The cases involved in the circuit conflict at issue in this case, almost all of which involved underlying legal issues on which the bankruptcy and lower courts were in conflict, illustrate the point. *See* p. 44, *supra*. So does this Court's decision in *Nobelman* v. *American Savings Bank*, 508 U.S. 324, 326-27 (1993), which arose from an appeal of a denial of confirmation and provided the Court the opportunity to resolve a circuit conflict. *Id.* at 327 & n.2.

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[23] *See Bulmer* v. *Bulmer*, 2013 WL 5604311, at *1 n.4 (D. Md. Oct. 10, 2013). In another case, the district court accepted jurisdiction over an order denying confirmation because the bankruptcy court did not grant leave to amend the plan. *See Pookrum* v. *Bank of Am., N.A.*, 512 B.R. 781, 783 (D. Md. 2014).

While the Court did not mention any jurisdictional issue in its opinion, *Nobleman* illustrates the utility of appeals such as this one to clarify the law.

In short, as Bank of America has informed this Court, barring appeals of denials of confirmation "will thwart the orderly development of bankruptcy law and the resolution of the many divisions of authority that currently infect the one area of law in which uniformity is constitutionally mandated." 13-1416 Br. of Bank of America 24. Such a rule "will impede the development of a uniform bankruptcy law, necessary to the operations of creditors . . . who do business in every jurisdiction." *Id.* at 12.[24]

C. Permitting Appeals of Grants But Not Denials of Plan Confirmation Would Create an Unfair Asymmetry

Treating denials of plan confirmation as nonfinal creates an unfair asymmetry in bankruptcy law, and has significant and unfortunate consequences for its development. In Chapter 13 cases, only debtors may propose plans before confirmation. *See* 11 U.S.C.

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[24] Creditors often seek or join in appeals of denials of confirmation. *See, e.g.*, *In re S. Beach Sec., Inc.*, 606 F.3d 366, 369 (7th Cir. 2010) (after "[t]he bankruptcy judge refused to confirm the plan," both the debtor "and its only creditor . . . appealed"); *In re Lievsay*, 118 F.3d 661, 662-63 (9th Cir. 1997) (rejecting arguments of both parties that denial is appealable); *In re Rabex of Colo., Inc.*, 226 B.R. 905, 906 (D. Colo. 1998) ("[The debtor] and the Official Unsecured Creditors' Committee . . . appeal from . . . [the] Order Denying Confirmation of Plan."); *In re Reid*, 179 B.R. 504, 505-06 (E.D. Tex. 1995) (after "the bankruptcy judge . . . denied confirmation of an amended Chapter 13 plan," the "debtors and the Bank then appealed").

§ 1321.[25] A rule that debtors are precluded from appealing denials of plan confirmation, while grants of plan confirmation are appealable as of right, creates an unfair asymmetry. *Cf. Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) (rejecting application of collateral order doctrine in part because it would "operate[] only in favor of plaintiffs," though the issue would "often be of critical importance to defendants as well"). Aside from its basic unfairness, such disparate treatment may ultimately lead to the development of bankruptcy precedents only through creditors' appeals, predictably resulting in a pro-creditor bias in bankruptcy law.

D. Interlocutory Appeal Under Section 158(d)(2) Is Not a Substitute for Appeal as of Right

Under 28 U.S.C. § 158(d)(2), a party may obtain authorization to appeal an interlocutory order to the court of appeals with leave of the bankruptcy court, district court, or, perhaps, the BAP. *See* p. 7, *supra*; *see also* 28 U.S.C. § 158(a)(3) (permitting interlocutory appeals to a district court "with leave of the court"), § 158(b) (same for appeal to BAP).[26] Interlocutory appeal provides a safety valve that allows parties to seek appellate review in relatively rare circumstances. It has never been viewed as a substitute for

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[25] While in Chapter 11, parties other than the debtor—namely "[a]ny party in interest"—"may file a plan" under certain circumstances, 11 U.S.C. § 1121(c), in fact the Chapter 11 plan is "typically proposed by the debtor." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2069 (2012).

[26] Courts are divided on whether Section 158(d)(2) permits interlocutory appeal from the BAP. *See* Pet. App. 4a n.3.

appeal as of right, and it is not the appropriate avenue for appeals of decisions that satisfy § 158(d)(1)'s requirements.

1. This Court has recognized that certified interlocutory appeals were designed to be "exceptional." *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 74 (1996) (quoting *Coopers & Lybrand*, 437 U.S. at 475). They are available for individual cases in which a question that warrants immediate review arises in an interlocutory posture, but they are not intended to address entire categories of cases in which appellate rights should be recognized. *Cf. Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 529 (1988) ("In fashioning a rule of appealability" in contrast to a rule of certification for interlocutory appeal, "we look to categories of cases, not to particular injustices.").

2. The Section 158(d)(2) certification process itself requires additional litigation that can burden the parties and the court. Unless the parties agree, the lower court must first decide a motion, which can involve a full round of briefing and argument. The court of appeals then must itself decide whether certification should be granted. The proceedings can be extensive. *See, e.g.*, *In re MPF Holding U.S. LLC*, 444 B.R. 719, 722 (Bankr. S.D. Tex. 2011); *Blausey* v. *United States Trustee*, 552 F.3d 1124, 1128 (9th Cir. 2009) (per curiam); *In re Scotia Pac. Co.*, 508 F.3d 214, 218 (5th Cir. 2007).

In this case, for example, the denial of confirmation led to two rounds of litigation on whether an interlocutory appeal was warranted—first, when petitioner sought appeal from the bankruptcy court to the

BAP, Pet App. 22a, 37a-45a, and then, when petitioner unsuccessfully sought appeal to the First Circuit, Pet. App. 16a-17a.[27] The entire process was a waste of resources for the parties and the courts, because the order satisfied Section 158(d)(1)'s requirements for an appeal as of right.

3. In any event, interlocutory appeals are of no help to debtors if the lower court or the appellate court is not persuaded that appeal is warranted. Here, for example, the BAP had already made findings more than sufficient to satisfy the standards in Section 158(d)(2). *See* Pet. App. 22a n.5, 43a-45a. The BAP nonetheless declined to certify the denial of petitioner's plan to the First Circuit, stating only that such certification was "unnecessary." Pet. App. 17a. Petitioner was entitled to appeal as of right under Section 158(d)(1), so that the court of appeals could address the validity of his hybrid plan on its merits.

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[27] The court of appeals stated that petitioner "could have sought certification and authorization to directly appeal the bankruptcy court's order to [the court of appeals] under 28 U.S.C. § 158(d)(2)," or, "had he chosen to take his intermediate appeal to the district court rather than the BAP, he could have sought permission to appeal the district court's interlocutory order under 28 U.S.C. § 1292(b)." Pet. App. 9a. It is entirely speculative whether the bankruptcy court and the First Circuit would have authorized petitioner to take the unusual step of bypassing the first-stage appeal and going directly to the court of appeals. There is also no reason to think that a district court would have certified an interlocutory appeal to the First Circuit under Section 1292(b) in this case, when the BAP declined to do so under the somewhat looser standard in Section 158(d)(2).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

1. Section 157 of Title 28 of the United States Code provides in pertinent part:

Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the

estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the

debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

* * * * *

2. Section 158 of Title 28 of the United States Code provides in pertinent part:

Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees;

and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that—

(A) there are insufficient judicial resources available in the circuit; or

(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11.

Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

(2)(A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is

established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

* * * * *

(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

3. Section 1291 of Title 28 of the United States Code provides:

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

4. Section 1292 of Title 28 of the United States Code provides in pertinent part:

Interlocutory Decisions

* * * * *

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

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